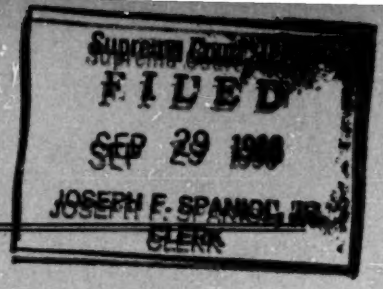

No. 88-120

In The

Supreme Court of the United States

October Term, 1988

VENITA VANCASPEL, et al.,

Petitioners,

v.

CHARLES T. CORWIN, D.D.S., et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PARTIES TO THE PROCEEDINGS

CHARLES T. CORWIN, D.D.S.; THE ESTATE OF RICHARD P. MULLINS, DECEASED; DONALD T. BOUDREAUX and PATRICIA E. BOUDREAUX, his wife; DAVID T. CARR, M.D.* and CHRISTINE N. CARR,* his wife; JOHN D. DICKERSON, JR.* and JOAN W. DICKERSON,* his wife; HAROLD O. HUDNALL and AUDREY S. HUDNALL, his wife; and ROBERT EMERSON CRATON* and MARY JANET CRATON,* his wife, were Appellants in the United States Court of Appeals for the Fifth Circuit.

MARNEY, ORTON INVESTMENTS, a General Partnership; THE ESTATE OF RONALD D. MARNEY, DECEASED; SIDNEY ORTON; MOH, INC.; VENITA VANCASPEL; VANCASPEL & CO., INCORPORATED; MARNEY PROPERTIES, INC.;* and SUZANN M. MARNEY, were Appellees in the United States Court of Appeals for the Fifth Circuit.

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*Petitioners' statement of Parties to the Proceedings omitted these parties as Appellants and Appellee in the United States Court of Appeals for the Fifth Circuit. DAVID T. CARR, M.D. and CHRISTINE N. CARR, his wife; JOHN D. DICKERSON, JR. and JOAN W. DICKERSON, his wife; and ROBERT EMERSON CRATON and MARY JANET CRATON, his wife are parties to this proceeding and do not waive their appearance by Petitioners' omission.

TABLE OF CONTENTS

Page

PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 4

SUMMARY OF ARGUMENTS 6

REASONS FOR DENYING THE WRIT OF CERTIORARI 7

I. *CORWIN II* IS NOT RIPE FOR REVIEW .. 7

II. A REVIEW OF *CORWIN II* LACKS FINALITY 8

III. *CORWIN II* CREATES NO INTOLERABLE CONFLICT 8

IV. REVIEW AND SUMMARY DISPOSITION OF *CORWIN II* WOULD BE UNFAIR 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES:

Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. ___, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987) 9, 11

Bailey v. Weinberger, 419 U.S. 953, 95 S. Ct. 190, 42 L. Ed. 2d 171 *reh'g denied* 419 U.S. 1061, 95 S. Ct. 647, 42 L. Ed. 2d 659 (1974) (White, Douglas & Stewart, JJ., dissenting mem.) 9

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975) (Blackmun, Douglas and Brennan, JJ., dissenting) 11

Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971) 10

Corwin v. Marney, Orton Investments, 788 F.2d 1063 (5th Cir. 1986) (*Corwin I*) ..... *passim*

Corwin v. Marney, Orton Investments, 843 F.2d 194 (5th Cir. 1988) (*Corwin II*) ..... *passim*

Huch v. United States, 439 U.S. 1007, 99 S. Ct. 622, 58 L. Ed. 2d 684, *reh'g denied* 439 U.S. 1135, 99 S. Ct. 1059, 59 L. Ed. 2d 98 (1978) (Rehnquist & Powell, JJ., dissenting mem.) 7

In Re Data Access Systems Securities Litigation, 843 F.2d 1537 (3rd Cir. 1988), *petition for cert. filed* 6, 7, 8, 10, 11, 12

Key v. Wise, 454 U.S. 1103, 102 S. Ct. 682, 70 L. Ed. 2d 647 (1981) (Brennan, Marshall & Blackmun, JJ., dissenting mem.) 9

Maffei v. United States, 406 U.S. 938, 92 S. Ct. 1789, 32 L. Ed. 2d 138 (1972) (Douglas, J., dissenting mem.) 9

TABLE OF AUTHORITIES–Continued

Page

Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 70 S. Ct. 252, 94 L. Ed. 562 (1950) 7

Montana v. Hall, 481 U.S. ___, 107 S. Ct. ___, 95 L. Ed. 2d 354 (1987) (Marshall & Stevens, JJ., dissenting) 10

Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 105 S. Ct. 2587, 86 L. Ed. 2d 168 (1985) (Brennan, Marshall & Blackmun, JJ., dissenting) 8

Ratchford v. Gay Lib., 434 U.S. 1080, 98 S. Ct. 1276, 55 L. Ed. 2d 789, *reh'g denied* 435 U.S. 981, 98 S. Ct. 1632, 56 L. Ed. 2d 74 (1978) (Rehnquist & Blackmun, JJ., dissenting mem.) 8

STATUTES:

15 U.S.C. § 78j(b) 2

RULES:

17 C.F.R. § 240.10b-5 (1937) 2, 3

RULES OF THE SUPREME COURT:

Rule 17.1(a) 7

BOOKS:

CCH, RICO–Business Disputes and "Racketeering" Laws ¶33 (1984) 9

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Respondents CHARLES T. CORWIN, D.D.S.; THE ESTATE OF RICHARD P. MULLINS, DECEASED; DONALD T. BOUDREAUX and PATRICIA E. BOUDREAUX, his wife; DAVID T. CARR, M.D. and CHRISTINE N. CARR, his wife; JOHN D. DICKERSON, JR. and JOAN W. DICKERSON, his wife; HAROLD O. HUDNALL and AUDREY S. HUDNALL, his wife; and ROBERT EMERSON CRATON and MARY JANET CRATON, his wife, respectfully request that upon consideration of the briefs filed that this Honorable Court deny certiorari to the United States Court of Appeals for the Fifth Circuit from the judgment and decision entered on April 26, 1988.

OPINIONS BELOW

In addition to *Corwin II*, Respondents previously appealed an earlier adverse decision to the Court of Appeals for the Fifth Circuit referred to herein as *Corwin I*. *Corwin II* refers to additional facts previously recited in *Corwin I* reported at 788 F.2d 1063 (5th Cir. 1986).

STATUTES INVOLVED

The Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) provides in relevant part:

SEC. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange–

. . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

17 C.F.R. § 240.10b-5 (1937) provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange–

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

STATEMENT OF THE CASE

Twice the Court of Appeals for the Fifth Circuit overruled the United States District Court's summary judgment. In each instance, Petitioners asserted a two (2) year statute of limitations defense to Respondents' Section 10(b), Rule 10b-5 and RICO claims. *Corwin v. Marney, Orton Investments*, 788 F.2d 1063 (5th Cir. 1986) (*Corwin I*) and *Corwin v. Marney, Orton Investments*, 843 F.2d 194 (5th Cir. 1988) (*Corwin II*). Respondents' claims included allegations of securities fraud for Petitioners' failure to disclose a conflict of interest as Respondents' (except Corwin) financial planner and advisor and other related claims.

The United States District Court permitted no discovery so the record on both appeals was scant. In the summary judgment proceedings, Respondents filed contraverting affidavits swearing to the factual allegations of their complaint. Petitioners merely filed the prospectus made the subject of this suit and also filed a Certificate of Limited Partnership for Woodway III, Ltd. The Certificate evidenced Venita VanCaspel's ownership of thirty-one and one-half percent (31½%) of Woodway III, Ltd., the

owner of the land upon which Respondents' limited partnership erected a five (5) story office building.

Initially, Petitioners did not assert their current position raising a statute of limitations defense requiring Respondents to sue within three (3) years. Petitioners asserted such defense only after the Court of Appeals for the Fifth Circuit rendered judgment in *Corwin II*.

Petitioners did not present, brief or argue the issues they now raise until they filed their untimely motion for rehearing. After allowing such late filing, the Court of Appeals for the Fifth Circuit summarily denied Petitioners' motion without requiring a response from Respondents.

Respondents' RICO claim remains. Therefore, any judgment favorable to Petitioners will not be dispositive of this case. Petitioners correctly acknowledge that Respondents' Racketeer-Influenced and Corrupt Organizations (RICO) claim is not barred by limitations. Accordingly, Respondents' approximately Three Million Dollar ($3,000,000.00) RICO claim and their pendent claims will continue to a trial on the merits even if this Court renders a judgment favorable to Petitioners' securities fraud limitations defense.

STATEMENT OF THE FACTS

Venita VanCaspel represented each Respondent except Corwin. She acted as their certified financial planner and financial advisor. In November, 1980, she gave a written invitation for her special clients to meet with

Ronald D. Marney to consider an investment in the Woodway III Office Building, Ltd. partnership (the "Office Building Partnership").

The Office Building Partnership proposed to buy land upon which to build a five (5) story office building from the Woodway III, Ltd. partnership (the "Land Partnership"). Under the proposed offering, the Land Partnership would sell its land to the Office Building Partnership in exchange for nine (9) of the Office Building Partnership units equalling twenty-two and one-half percent (22½%) of the entire Office Building Partnership.

After hearing Venita VanCaspel's and Ronald D. Marney's presentation, Corwin, the representative of The Estate of Richard P. Mullins and each husband and wife Respondent paid Sixty Thousand Dollars ($60,000.00) for each one (1) unit of the Office Building Partnership. Pursuant to the offering, Respondents paid Thirty Thousand Dollars ($30,000.00) in both December 1980 and December 1981. Each one (1) unit owned by Respondents equalled two and one-half percent (2½%) of the Office Building Partnership. Respondents collectively owned seven (7) units.

After the death of Ronald D. Marney, and after the Respondents paid two (2) cash calls totalling an additional Thirty-Three Thousand Dollars ($33,000.00) per unit, Respondents retained an accountant to review the partnership records. He discovered numerous financial, management and partnership irregularities. He also discovered Venita VanCaspel possessed an undisclosed interest in the Land Partnership.

Venita VanCaspel failed to disclose the fact that she owned one-third (1/3) of the Land Partnership equaling approximately three (3) units of the Office Building Partnership. Venita VanCaspel never disclosed her ownership at any time prior to Respondents' accountant's discovery of such facts in the summer of 1984. Venita VanCaspel never revealed that she would make an undisclosed, substantial profit from her promotion of this investment opportunity.

Respondents confronted Petitioners with the foregoing facts and sought to rescind the transaction. Petitioners refused. Respondents filed suit and Petitioners asserted statute of limitation defenses as stated in *Corwin I* and *Corwin II*.

SUMMARY OF ARGUMENTS

This Court should deny the Joint Petition for Writ of Certiorari because:

(a) This case is not ripe for appeal;

(b) The legal issues Petitioners assert were never argued or considered by the parties or the Court of Appeals for the Fifth Circuit prior to its written decision in *Corwin II;*

(c) A judgment by this Court sustaining Petitioners' position will not dispose of Respondents' RICO and state-law claims; and

(d) All Petitioners' legal assertions are before this Court in *In Re Data Access Systems Securities Litigation,* 843 F.2d 1537 (3rd Cir. 1988), *petition for cert. filed.*

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. *CORWIN II* IS NOT RIPE FOR REVIEW.

Petitioners' reasons for granting the writ rely entirely upon the decision in *In Re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3rd Cir. 1988), *petition for cert. filed*. This decision followed *Corwin II's* decision within a few weeks. Prior to *Corwin II's* decision, Petitioners never raised the legal issues and arguments cited in *In Re Data Access Systems*. They did not allege, brief or argue such contentions in either *Corwin I* or *Corwin II* except by way of their out-of-time motion for rehearing now made the basis of their petition to this Court.

The Court of Appeals for the Fifth Circuit ruled correctly on the case before it. As a matter of sound judicial discretion, this Court should decline to review *Corwin II* at this time, *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 70 S. Ct. 252, 94 L. Ed. 562 (1950) and *Huch v. United States*, 439 U.S. 1007, 99 S. Ct. 622, 58 L. Ed. 2d 684, *reh'g denied* 439 U.S. 1135, 99 S. Ct. 1059, 59 L. Ed. 2d 98 (1978) (Rehnquist & Powell, JJ., dissenting mem.).

Corwin II is not the exception, but rather is the rule in the Fifth Circuit. It has been so for at least nine (9) years, *Corwin I*. The Court of Appeals for the Fifth Circuit has not "(R)endered a decision in conflict with the decision of another federal court of appeals on the same matter . . . " or "(D)eparted from the accepted and usual course of judicial proceedings . . . " Rules of the Supreme Court, Rule 17.1(a).

The Court of Appeals for the Third Circuit's decision in *In Re Data Access Systems* departs from the accepted

rule of law, not *Corwin II*. This Court should not intervene in *Corwin II* merely because *In Re Data Access Systems* departs from the norm. As Justice Brennan cautions in *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 105 S. Ct. 2587, 86 L. Ed. 2d 168 (1985) (Brennan, Marshall & Blackmun, JJ., dissenting), this Court should selectively employ its discretionary powers and refuse to grant certiorari in *Corwin II*.

II. A REVIEW OF *CORWIN II* LACKS FINALITY.

Petitioners do not seek review of Respondents' RICO claims, *Corwin II*. The same facts, proof and legal arguments relating to Respondents' Section 10(b) and Rule 10b-5 claims form the foundation of Respondents' RICO suit, *Corwin I* and *Corwin II*.

A favorable ruling to Petitioners will not resolve the case, or remove the securities fraud issues from the trial court.

III. *CORWIN II* CREATES NO INTOLERABLE CONFLICT.

Allowing the legal theories espoused in *In Re Data Access Systems* to percolate will cause no immediate nor irreparable harm. This Court has routinely exercised its judicial discretion to reject the grant of certiorari where significant legal issues and substantial conflicts among the various Courts of Appeal existed:

1. Certiorari denied, First and Fourteenth Amendments, *Ratchford v. Gay Lib.*, 434 U.S. 1080, 98 S. Ct. 1276, 55 L. Ed. 2d 789 *reh'g denied* 435 U.S. 981, 98 S. Ct. 1632, 56 L. Ed. 2d 74 (1978) (Rehnquist & Blackmun, JJ., dissenting mem.).

2. Certiorari denied, exclusive original jurisdiction in federal courts under The Federal Quiet Title Act,

Key v. Wise, 454 U.S. 1103, 102 S. Ct. 682, 70 L. Ed. 2d 647 (1981) (Brennan, Marshall & Blackmun, JJ., dissenting mem.).

3. Certiorari denied, seven (7) Courts of Appeal differing from two (2) Courts of Appeal regarding the accused's waiver of error when offering evidence after denial of a motion for acquittal, *Maffei v. United States*, 406 U.S. 938, 92 S. Ct. 1789, 32 L. Ed. 2d 138 (1972) (Douglas, J., dissenting mem.).

4. Certiorari denied, decision of Ninth Circuit squarely in conflict with Second, Third and Sixth Circuits concerning denial of HEW benefits, *Bailey v. Weinberger*, 419 U.S. 953, 95 S. Ct. 190, 42 L. Ed. 2d 171 *reh'g denied* 419 U.S. 1061, 95 S. Ct. 647, 42 L. Ed. 2d 659 (1974) (White, Douglas & Stewart, JJ., dissenting mem.).

Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. ___, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987) resolved the civil RICO limitations issue in 1987. For at least five (5) years prior to this decision, federal district and appellate courts applied different periods of limitation predicated upon allegations of criminal misconduct, fraud, securities fraud, collusion and other factual bases. CCH, RICO–Business Disputes and "Racketeering" Laws ¶33 (1984).

This Court did not rush to judgment in *Agency Holding Corp.* The courts below had several years to discuss and consider the merits of various positions. This Court had the benefit of such considerations. Nevertheless, the lower courts employed a variety of approaches while awaiting guidance from this Court. *Corwin II* creates no greater intolerable conflict.

Denying certiorari of *Corwin II* does not preclude a later review of this case after its return to the district

court, if indeed it is not otherwise resolved. The Court of Appeals for the Fifth Circuit's remand on the RICO violations will go forward regardless of any securities fraud limitations issues being considered by this Court. If in the interim period prior to rendition of a judgment on the merits or while such judgment is appealed, the Supreme Court of the United States creates a "federal securities fraud" period of limitations, these parties will be obligated to follow such ruling. Therefore, Petitioners will suffer no harm resulting from denial of certiorari at this time.

IV. REVIEW AND SUMMARY DISPOSITION OF *CORWIN II* WOULD BE UNFAIR

Justice Marshall's dissent in *Montana v. Hall*, 481 U.S. ___, 107 S. Ct. ___, 95 L. Ed. 2d 354 (1987) (Marshall & Stevens, JJ., dissenting) addresses Respondents' fears. It would be unfair to require Respondents to address legal issues not previously raised in *Corwin I* and *Corwin II*. A summary disposition by this Court would deprive Respondents from ever having an opportunity to address the merits of Petitioners' current contentions.

Of greater concern is the retroactive application of this new, all-encompassing federal securities statute of limitations. Chief Justice Seitz's dissent in *In Re Data Access Systems* cites the three (3) part test in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971). Under the *Chevron* test, it would be unfair to apply such a newly announced rule of law to Respondents' claims.

Respondents' claims are not against some remote party. Respondents received all their investment information from Petitioners. Respondents' claims are not speculative. Respondents have each paid an average of One

Hundred Thousand Dollars ($100,000.00) in cash. And Petitioners were, with the exception of Corwin, Respondents' financial advisors.

The majority of the *Blue Chip Stamps* Court aptly wrote that "(T)he development of the law of deceit has been the elimination of artificial barriers to recovery on just claims . . . " *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975) (Blackmun, Douglas and Brennan, JJ. dissenting). The application of a three (3) year limitations period to the present case and the shortening of the discovery rule to two (2) years would create barriers where none previously existed for *actual fraud*. Section 10(b) and Rule 10b-5 are not mere technicalities. Such deceit is real.

In his dissent in *Blue Chip Stamps*, Justice Blackmun advocates justice not expediency, "We should be wary about heeding the seductive call of expediency and about substituting convenience and ease of processing for the more difficult task of separating the genuine claim from the unfounded one," *Blue Chip Stamps*, 421 U.S. 770.

A strong, logical argument can be made to distinguish the holding between *Corwin II* and *In Re Data Access Systems*. The Court of Appeals for the Third Circuit applied rules concerning technical violations and nondisclosure statutes to create a limitations period for a federal securities statute and the accompanying rule proscribing actual fraud. Respondents would argue that a more appropriate limitations period would be the four (4) year limitations as announced by this Court in *Agency Holding Corp.*

Nevertheless, *Corwin II* has never addressed such issues and their consideration at this time, especially without an opportunity to brief them, would be premature and unfair.

CONCLUSION

Petitioners seek certiorari for the wrong case. *Corwin II* is within the judicial mainstream. *Corwin II* has not considered the issues Petitioners seek to raise in this Court. *Corwin II* is not final and the denial of certiorari will not adversely affect Petitioners' subsequent opportunity to assert such questions. Grant of certiorari will work an undue and unnecessary hardship upon Respondents both in time and in money.

Lastly, should Petitioners find it compelling to express their perspective on the issues, *In Re Data Access Systems* is currently pending before this Court on an application for writ of certiorari. If such writ is granted, Petitioners may advance their views with an "amicus curiae" brief in such appeal. Ultimately, *Corwin II* will be affected by such review to the extent that the decision in *Corwin II* rests upon the securities fraud claim rather than the RICO claim.

Respectfully submitted,

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